



Comptroller General
of the United States
Washington, D.C. 20548

1055287

Decision

Matter of: EAI Corporation

File: B-252748

Date: July 26, 1993

Donald J. Walsh, Esq., Wright, Constable & Skeen, for the protester.

Renee S. Karn, Esq., Defense Logistics Agency, for the agency.

Behn Miller, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where protester concedes that agency properly canceled solicitation but nonetheless requests proposal preparation and protest costs on the ground that the agency negligently issued the solicitation and negligently explained the basis for cancellation, request for costs is denied since mere negligence or lack of due diligence by the agency does not provide a basis for the recovery of such costs absent evidence that the agency has acted in violation of statute or regulation.

DECISION

EAI Corporation protests agency actions under request for proposals (RFP) No. DLA900-92-R-0064, issued by the Defense Logistics Agency (DLA) for the operation of the Chemical Warfare/Chemical Biological Information Analysis Center (CBIAC) located in Aberdeen Proving Ground, Maryland. EAI initially protested the agency's decision to cancel the RFP. In its comments on the agency report, the protester concedes that the solicitation was properly canceled; however, the protester now argues that it is entitled to the costs of preparing its proposal and pursuing its protest since the agency was allegedly negligent in issuing the solicitation and in explaining the basis for the RFP's cancellation.

We deny the claim for costs.

The RFP was issued on April 20, 1992, and required offerors to submit both a technical and cost proposal; for evaluation purposes, the solicitation provided that technical merit was more important than price. On March 8, 1993, after extensive clarification and evaluation proceedings, the agency issued the following cancellation notice to all offerors which stated in relevant part:

"In order to comply with current [Department of Defense (DOD)] requirements (such as the need for support in operational test and evaluation, research and development activities, and producibility of CB material) this solicitation has been canceled . . . The new solicitation will be announced in the [Commerce Business Daily] within the next few months."

On March 22, EAI filed a protest with this Office challenging the cancellation as improper; EAI argued that the changes identified in the March 8 cancellation notice--particularly the requirement for CB producibility--were "ancillary and not material to CBIAC operations" and were being implemented merely to steer contract award for the CBIAC operations to the incumbent contractor for these services.

In its report on the protest, DLA first explained that its March 8 cancellation "notification contained basic reasons for the cancellation without detailed justifications in order to protect the integrity of the procurement process since the acquisition was to be resolicited." DLA reported that it refrained from offering an in-depth explanation of the significance of the technical changes because it saw no way to avoid a discussion which would give the protester an undue competitive advantage in preparing its technical proposal for the resolicitation. DLA further explained that contrary to the protester's speculation, the required technical modifications were the result of a new charter for the CBIAC, several new DOD directives, and proposed legislative action which would impact the CBIAC operations. In short, the detailed explanation in the agency's report clearly showed that the technical modifications which need to be made to the CBIAC requirement reflect policy changes which were enacted after the solicitation's closing date and which will significantly impact the technical scope and competition for this requirement.¹

¹The agency report is subject to a General Accounting Office protective order to which counsel for EAI has been admitted;
(continued...)

In its comments on the agency report the protester concedes that the cancellation was proper but argues that DLA should pay the protester's proposal preparation costs since "[m]any of the reasons given to justify the cancellation were the result of oversight on the part of DLA."

The record does not support EAI's allegations of negligence with respect to the preparation or issuance of the RFP. The expansion of the CBIAC requirement to include research and development tasks as well as a requirement for CB producibility was primarily due to the September 25 enactment of a new charter for the CBIAC--which took place well after the solicitation's June 4 closing date. In any event, the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3554(c)(1) (1988), and our implementing regulations, 4 C.F.R. § 21.6(d) (1993), provide for the award of proposal preparation costs only where our Office determines that "a solicitation, proposed award, or award of a contract does not comply with a statute or regulation." Mere negligence or lack of diligence on the part of the contracting agency in preparing and issuing a defective solicitation provides no basis on which to allow the recovery of proposal preparation costs, where, as here, the agency amends or cancels the defective procurement--and there is no indication of bad faith, or that the agency acted arbitrarily or capriciously. See Comspace Corp., B-250863, Jan. 5, 1993, 93-1 CPD ¶ 14; Special Sys. Servs., Inc., B-238168, Apr. 4, 1990, 90-1 CPD ¶ 359.

EAI also argues that "[h]ad DLA been more forthright in notifying EAI of the reasons for the cancellation" and "[h]ad the cancellation been more carefully orchestrated, EAI could have avoided . . . the costs of this protest."


While EAI contends that the "vague" explanation in the agency's March 8 cancellation notice caused the protester to file and pursue this protest--and accordingly this Office should award EAI its protest costs--we think the March 8 notice adequately identified the agency's basic cancellation reasons. Although the notification was brief, the March 8 notice clearly apprised the protester that cancellation was required due to the agency's need to incorporate research and development and CB material producibility tasks into the CBIAC operations.

¹(...continued)

our summation of the agency's detailed cancellation discussion is necessarily general given the agency's concerns with respect to the reprocurement effort for this requirement.

Moreover, as in the case of proposal preparation costs, our authority under CICA to allow the recovery of protest costs is predicated on a determination by our Office that a solicitation, proposed award, or award does not comply with statute or regulation. 31 U.S.C. § 3554(c)(1); 4 C.F.R. § 21.6(d). Since EAI concedes that the cancellation was proper, and since the record does not otherwise indicate--nor does the protester allege--that the agency has acted contrary to statute or regulation, there is no basis to allow EAI to recover its protest costs. See Special Sys. Servs., Inc., supra; Computer Resource Tech. Corp., B-218292.2, July 2, 1985, 85-2 CPD ¶ 14.

The claim for costs is denied.


for James F. Hinchman
General Counsel